

**REDACTED DECISION – 05-217 W -- BY ROBERT W. KIEFER, JR., ALJ --
SUBMITTED for DECISION on SEPTEMBER 19, 2008 -- ISSUED on DECEMBER 15,
2008**

SYNOPSIS

PERSONAL INCOME TAX WITHHOLDING – OFFICER MONEY PENALTY LIABILITY – A “corporate officer” who is appointed to such a position without his knowledge or consent and who, during the period for which taxes were withheld but not remitted to the State, performed the duties of an employee and did not perform any duties respecting the withholding of said taxes and failure to remit the same, may not be held liable as a “person required to collect, account for and pay over any tax” pursuant to the provisions of W. Va. Code § 11-10-19(a).

FINAL DECISION

On January 15, 2005, the Accounts Monitoring Unit of the Internal Auditing Division the Compliance Division (“the Division”) of the West Virginia State Tax Commissioner’s Office (“the Commissioner” or “the Respondent”) issued a personal income tax assessment against the Petitioner, an individual, in his capacity as an officer of Corporation A. This assessment was issued pursuant to the authorization of the State Tax Commissioner, under the provisions of Chapter 11, Articles 10 and 21 of the West Virginia Code. The assessment was for the year

period of July 1, 2000, through June 30, 2001, for a money penalty for failure to pay over tax withheld from the pay of employees of Corporation A, for a total assessed money penalty liability of \$____. Written notice of this assessment was served on the Petitioner on March 18, 2005.

Thereafter, under cover letter dated May 16, 2005, by Federal Express delivery received on May 17, 2005, the Petitioner timely filed with this tribunal, the West Virginia Office of Tax Appeals, a petition for reassessment. W. Va. Code §§ 11-10A-8(2) [2007] & 11-10A-9(a)-(b) [2005].

Subsequently, notice of a hearing on the petition was sent to the Petitioner and a hearing was held in accordance with the provisions of W. Va. Code § 11-10A-10 [2002].

FINDINGS OF FACT

1. Corporation A is a corporation that, during the period in question, had a blanket contract to lay new gas lines for company A in Morgantown and Fairmont and to do all of the repairs on its existing gas lines.
2. Company A is a residential natural gas supplier in the Morgantown and Fairmont areas. Company A would bid contracts out on a yearly basis.
3. The Petitioner, was named as the Secretary of Corporation A at the time the corporation was formed on March 9, 1988. State's Exhibit No. 3.
4. He was the only son.
5. The Petitioner testified that he was nineteen (19) years old at that time.
6. He was not involved in the formation of Corporation A.
7. He had no input in the name of Corporation A.
8. At the time, he did not know that he had been named secretary of Corporation A.

9. He was never subsequently asked to be secretary of Corporation A.
10. The Petitioner testified that he first became aware that he was secretary of Corporation A in 2005, when he was served with notice of the assessment that is the subject of this proceeding.
11. He provided no capital for the formation of Corporation A.
12. He does not know what the secretary of Corporation A does.
13. He never received money or other compensation for being secretary of Corporation A.
14. So far as the Petitioner knows, although the business was formally incorporated, his father ran it more as if it was his business and not as if it were a corporation and his father was one of the employees of Corporation A.
15. So far as the Petitioner knows, his father was the only shareholder of Corporation A.
16. He never attended any meetings of corporate officers as secretary of Corporation A.
17. So far as he knows, the Petitioner's father never held any formal meetings of Corporation A, such as shareholders' meetings or meetings of the Board of Directors.
18. He never prepared any minutes of meetings of the shareholders as secretary of Corporation A.
19. The Petitioner never attended any meetings of the Board of Directors of Corporation A in his capacity as secretary of Corporation A.
20. He never prepared any minutes of meetings of the Board of Directors as secretary of Corporation A.
21. He never signed any corporate documents as secretary of Corporation A.
22. Corporation A's books and accounts were kept by his father and a certified public accountant. His stepmother, also helped in keeping Corporation A's books and accounts.

23. The Petitioner did not supervise or direct his father, his stepmother or the CPA in keeping Corporation A's books and accounts.

24. The CPA had the authority to prepare Corporation A's tax returns. His father was responsible for signing the return and ensuring that the amount due was paid.

25. The Petitioner did not prepare or sign any of Corporation A's tax returns.

26. He did not review Corporation A's tax returns before they were filed.

27. He did not sign checks for payment of any taxes shown due on any of Corporation A's tax returns.

28. He did not provide the method of payment for any amounts shown due on Corporation A's tax returns.

29. From July, 2000, through July, 2001, the Petitioner was not aware that the Corporation A was not filing returns or paying its taxes in a timely manner.

30. During the period of 2000 and 2001 his father did not discuss the problems of Corporation A with the Petitioner.

31. He was first aware this was occurring at the time he was served with the assessment, in March, 2005.

32. The Petitioner did not decide the order in which of the Corporation A's debts were to be paid.

33. He did not sign any of Corporation A's banking or other financial accounts.

34. He did not sign any checks on behalf of Corporation A.

35. He did not sign employee payroll checks.

36. He made no financial or managerial decisions, such as what bills to pay, where to borrow money, when or where to buy or sell equipment, or other such decisions.

37. He might give advice as to what equipment might be necessary for a particular job, but he would not buy the equipment, or sell it when the job was through.

38. Aside from his day-to-day duties, he never undertook any official duties on behalf of Corporation A.

39. The Petitioner was a foreman/equipment operator for Corporation A. As foreman, he had a crew of eight to ten men working for him.

40. The crew would be assigned a particular job.

41. On a day-to-day basis, he would meet an inspector from Company A, go out and look at the job and get things lined out, order pipe and material necessary to perform the job, line up his crew, go out and flag off the job, contact Miss Utility and then replace the pipe. If the job was along a municipal street, he would dig up the street to replace line, as necessary.

42. He laid a lot of "cross-country" lines for different companies in the area.

43. He was paid as an employee.

44. According to the Petitioner, his father suffered a health problem and shortly thereafter his and his father's personal relationship started going bad, which was the genesis of the demise of Corporation A.

45. His father sold Corporation A in May, 2001, to Corporation B, which is located in a city in northern West Virginia.

46. The Petitioner prepared a resume in June, 2001. Petitioner's Exhibit No. 1. The resume shows that he began working for Corporation B as a foreman and heavy equipment operator in June, 2001.

47. The Petitioner's duties with Corporation B were of the same general nature as his duties with Corporation A.

48. He never did any work for Corporation A after he commenced employment with Corporation B.

DISCUSSION

W. Va. Code § 11-10-19, relating to penalties, provides as follows:

(a) Failure to collect, account for, and pay over tax, or attempt to defeat or evade tax.

Any person required to collect, account for and pay over any tax administered under this article, who willfully fails truthfully to account for and pay over such tax, and any person who willfully attempts in any manner to evade or defeat any such tax or the payment thereof, shall, in addition to other penalties provided by law, be liable for a money penalty equal to the total amount evaded, or not collected, or not accounted for and paid over. No additions to tax shall be imposed under section eighteen for any offense to which this subsection is applicable.

The issue presented by this matter is whether or not the Petitioner is a person who is required to collect, account for and pay over tax that was withheld from the pay of the employees of Corporation A.

The evidence in this matter is uncontroverted and clearly shows that the Petitioner was not a person responsible to collect, account for and pay over any tax liability owed by Corporation A. While he was named a corporate officer, he was so named without his knowledge or his consent. The Petitioner merely acted as an employee of the corporation and duties that he performed were not in the nature of duties that might be performed by a corporate officer. At no time did the Petitioner undertake to perform any of the administrative or financial duties on behalf of the corporation that might make him liable pursuant to the provisions of W. Va. Code § 11-10-19(a).

The evidence presented in this matter shows that the persons most likely to be liable pursuant to the provisions of W. Va. Code § 11-10-19(a) are his father and, possibly, his former stepmother. It appears that his father was the person who was responsible for all of the

administrative and financial duties of Corporation A, except insofar as his former stepmother performed some bookkeeping for Corporation A. Given the evidence respecting their performance of administrative and financial duties and his non-performance of such duties, it is clear that the Petitioner cannot be held liable pursuant to the provisions of § 11-10-19(a).

CONCLUSIONS OF LAW

Based upon all of the above it is **DETERMINED** that:

1. In a hearing before the West Virginia Office of Tax Appeals on a petition for reassessment, the burden of proof is upon the Petitioners to show that any assessment of tax against him is erroneous, unlawful, void or otherwise invalid. *See* W. Va. Code § 11-10A-10(e) [2002]; W. Va. Code. St. R. §§ 121-1-63.1 and 69.2 (Apr. 20, 2003).

2. The Petitioner in this matter has carried his burden of proving that the assessment of taxes against him is erroneous, unlawful, void or otherwise invalid.

DISPOSITION

WHEREFORE, it is the **FINAL DECISION** of the **WEST VIRGINIA OFFICE OF TAX APPEALS** that the personal income tax withholding money penalty assessment issued against the Petitioner for the year period of July 1, 2000, through June 30, 2001, in the amount of \$13,356.56, should be and is hereby **VACATED**, and the Petitioner owes no further liability for the period in question.

APPEAL PROCEDURES

If an aggrieved party wishes to appeal this Final Decision to an appropriate West Virginia circuit court, W. Va. Code § 11-10A-19(a), as last amended, sets forth that such an appeal must be filed within sixty (60) days after the date of service of this Final Decision upon the party. W.

Va. Code § 11-10-19, as last amended, and the *West Virginia Rules of Procedure for Administrative Appeals* (effective Jan. 01, 2008) (*State Court Rules* volume of West's W. Va. Code Annotated), set forth the procedure for the appeal to circuit court.

An appeal petition filing fee is normally required by the circuit court, and, in most cases, an appeal bond must be filed, if the appeal to the circuit court is by a taxpayer. Under W. Va. Code § 11-10-19(b), as last amended, the West Virginia Office of Tax Appeals (or one or more of its administrative law judges), as a totally independent, quasi-judicial tribunal, is not a party to the appeal and is not to be named as a party to the appeal.

On the other hand, under the *West Virginia Rules of Procedure for Administrative Appeals*, in order to provide the record to the circuit court, the **appellant-petitioner** to the circuit court must always provide the **West Virginia Office of Tax Appeals** (in addition to the other actual party to the appeal, that is, the State Tax Commissioner's Office or the Taxpayer, as well as the West Virginia Attorney General's Office) with a copy of the filed petition for judicial review, along with a copy of the filed "Docketing Statement" accompanying the filed petition for judicial review.

Within fifteen (15) days after receipt of this written notice of the appeal from the appellant-petitioner, or within such further time as the circuit court may allow, the West Virginia Office of Tax Appeals, pursuant to the provisions of the *West Virginia Rules of Procedure for Administrative Appeals*, will prepare and transmit to the circuit court a certified copy of the entire record in the matter. Pursuant to those same *Rules*, if the transcript of the evidentiary hearing is not yet complete within this time period, this tribunal will transmit to the circuit court a certified copy of the entire record in the matter within fifteen (15) days after receipt of the completed transcript.

As set forth in W. Va. Code St. R. § 121-1-86 (Apr. 20, 2003) (part of the *Rules of Practice and Procedure before the West Virginia Office of Tax Appeals*), the West Virginia Office of Tax Appeals will: (1) send to the parties a detailed index of the record at the same time it transmits to the circuit court a certified copy of the entire record, § 86.4; (2) at the same time send to the appellant(s)-petitioner(s) a bill (payable to the “State of West Virginia”), due within thirty (30) calendar days, for the reasonable costs of preparing the record, § 86.3; and (3) upon payment of such record preparation costs, send to the parties a certified copy of the entire record.

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____
Robert W. Kiefer, Jr.
Administrative Law Judge

Date Issued